



IN THE
Supreme Court of the United States

OCTOBER TERM, 1944

THE EMIGRANT INDUSTRIAL SAVINGS BANK,
Plaintiff-Respondent,

against

EMIL J. SONDERLICK,
Defendant-Petitioner,

CATHERINE M. TERRIAULT, *et al.*,
Defendants.

BRIEF IN SUPPORT OF PETITION.

Opinions Below.

No opinion was rendered by any of the courts below except the following:

Supreme Court—Special Term.

New York Law Journal—August 3, 1943.

By Mr. Justice Colden.

Emigrant-Indus. Sav. Bank v. Sonderlick—Two motions: (1) By the plaintiff in an action to foreclose a first mortgage for summary judgment striking out the amended answer of the defendant Sonderlick and for the appointment of a referee to compute, and (2) by said defendant to vacate the extended receivership. A consideration of the papers submitted leads to the conclusion that no triable issues exist and that there is no merit to the defendant's amended answer

or to his cross-motion to vacate the extended receivership. The plaintiff's motion is accordingly granted and that of the said defendant in all respects denied. Submit orders.

Jurisdiction.

The judgment of the Appellate Division of the Supreme Court of the State of New York, Second Department, now sought to be reviewed, was entered on February 21, 1944. On March 20, 1944, the same Court denied petitioner's motion for permission to appeal to the Court of Appeals of the State of New York. The Court of Appeals denied like permission on May 25, 1944. On August 25, 1944, Mr. Justice Jackson, of the Supreme Court of the United States, signed an order extending petitioner's time to apply for certiorari to and including September 25, 1944.

The jurisdiction of this Supreme Court is invoked under Section 237 (b) of the Judicial Code as amended, 28 U. S. C., Section 344 (b).

Petitioner, in his application for permission to appeal to the Court of Appeals, duly raised the constitutional question and urged that the summary dismissal of his amended answer is reconcilable neither with the law nor the plain justice of the case and constitutes a deprivation of his property without due process of law, in violation of the Constitution of the United States of America, Amendment Fourteen, and of the Constitution of the State of New York, Article I, Section 6.

Statement of the Case.

A summary statement of the case is set forth in the petition.

Specification of Errors to be Urged.

It is intended by petitioner to urge as errors, unless limited by this Supreme Court, all of the matters set forth in the petition as reasons for the allowance of the writ.

Argument.

1. *The respondent was not entitled to a summary judgment because its moving affidavits were insufficient and inadequate and because issues of fact were raised by the petitioner's affidavit in opposition and by respondent's reply affidavit. Dwan v. Massarene, 199 App. Div. 872.*

2. *Petitioner has shown that his defense is bona fide, of a substantial character and was interposed in good faith. Dwan v. Massarene, supra.*

3. *Respondent cannot procure the benefit of the extension of the receivership to its action because the original order appointing Hallinan a receiver in the Gelly v. Kalamon action was void. Brooklyn Empire Const. Co., Inc. v. Cinak Realty Corporation et al., 234 App. Div. 428.*

4. *The dismissal of petitioner's amended answer without a trial and on the basis of an alleged adjudication in an action to which he was neither party nor privy was a deprivation of property without due process of law, in violation of the Constitution of the United States, Amendment XIV. Postal Telegraph-Cable Co. v. Newport, 247 U. S. 464, 62 L. Ed. 1215.*

Conclusion.

For the reasons stated in the petition and in this brief it is respectfully submitted that the application for the writ of certiorari should be granted.

Respectfully submitted,

EMIL J. SONDERLICK,
Petitioner,

by JACOB W. FRIEDMAN,
Attorney for Petitioner.

